Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930.

RAMESON BROTHERS, etc., *et al.*,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14931.

FREDERICK M. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14932.

WILLIAM W. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

Jurisdictional Statement.

Appellees adopt and incorporate herein the Jurisdictional Statement of Appellants.

Preliminary Statement Relative to Questions Involved.

In the matter before this Court there are two Specifications of Objections, one based upon Section 14-c, Subdivision (2) of the Bankruptcy Act, and the other based

upon Section 14-c, Subdivision (7). If the order of the Referee is sustainable on one of the grounds for denying a discharge, it is not necessary for this Court to consider the other ground. (*Dixwell v. Scott & Company* (C. C. A., Mass.), 115 F. 2d 873.) We shall, therefore (believing the evidence sufficient on the point), limit ourselves to Objections based on Section 14-c(7), without, however, waiving oral argument on the other. For convenience we follow Appellant's order of argument.

ARGUMENT.

(On Objections Based on Section 14-c(7).)

I.

Were the Trustee's Specifications of Objections to Discharge Barred as Not Having Been Filed Within the Statutory Time?

No objection was made on this ground at the hearing before the Referee, nor was such objection set forth in Appellants' petition for review of the Referee's Order.

The petition of a person aggrieved by an order of a Referee shall set forth the order complained of and the alleged errors in respect thereto. (U. S. C. A., Title 11, Sec. 67(c).)

The judge on review restricts his consideration of the case to the specified errors complained of in the petition and matters not then pressed or not mentioned in the petition will be considered as waived.

In re McCann Brothers Ice Co. (D. C., Pa.), 171 Fed. 265;

In re Peters (D. C., N. Y.), 39 Fed. Supp. 38, 39;

In re Massa, 133 F. 2d 191, 192.

A. Even if the Court Should Find No Waiver, the Referee Had the Power to and Did Extend the Time for Filing Specifications of Objections.

Rule 207 of the Bankruptcy Rules for the Southern District of California provides that any Referee may at any time act in any case pending before any other Referee at the request of the latter. It may be assumed that Referee Reuben G. Hunt was not acting beyond his powers and therefore was requested by Referee Dickson to sign the order in cases Nos. 55190 and 55191, extending the time for filing Objections to and including November 17, 1953. It may well be that under the circumstances Referee Hunt inadvertently failed to sign the order in case No. 55062, which was filed at the same time as the other petitions, assuming, no doubt, that the petition filed in cause No. 55062 was merely a copy of the one which he did sign.

Regardless of the order extending time, Referee Dickson impliedly extended the time by proceeding (without objection from the Appellants) with the hearing in all three matters on August 31, 1954. The filing of objections to discharge subsequent to the time fixed in the order for filing objections, notification to bankrupt of the filing, and the holding of a hearing thereon may be treated as evidence that the time for filing was extended, in the event that this Court should determine that there was no formal order of extension.

In re Massa (C. C. A. Conn.), 133 F. 2d 191, at pp. 191, 192.

The time may be extended for filing objections after the time has expired as well as before.

In re Levin (C. C. A. Mass.), 176 Fed. 177, 178, 179.

General Order No. 32, Section 53 of Title 11, does not operate as a Statute of Limitations.

In re Nathanson (D. C. N. Y.), 152 Fed. 585, 586.

On this point Appellants state on page 9 of their brief:

> "The courts have consistently held that any extension of time must be obtained before the expiration of that originally fixed as the court is without power to grant an extension after the time has expired."

In support of this statement the Appellants cite the following cases:

In re Levin (C. A. Mass.), 176 Fed. 177;
In re Brecher (C. A. N. Y.), 4 F. 2d 1001;
Rerat v. Fisk Tire Inc. (C. A. Minn.), 28 F. 2d 607;
In re Kuhne, 18 Fed. Supp. 985; and
In re Reigel, 21 Fed. Supp. 565.

A review of these cases will disclose that the *Levin, Brecher,* and *Rerat* cases hold exactly the opposite; and that the *Kuhne* case is not in point, due to the fact that the question presented in this case was a motion to amend after the time had passed for filing objections and the motion was granted. The *Reigel* case does so hold, under a literal interpretation of General Order No. 32 of the Supreme Court, as amended in 1933, that the filing of objections after the time set by the Referee is not permitted, and then the court, in that case, in order to prevent the discharge of the bankrupt, states that even without the objections being on record, the court can hear evidence at the time set for the hearing and deny the discharge. The actual words of the court are as follows:

> "This does not preclude the court from taking evidence to determine whether a discharge should

> be granted or withheld. Any party in interest may present such evidence in the same manner and with the same effect as if it had been offered by the original objecting creditor."

The one case which Appellants might have cited on this point (which they cite upon a subsequent point) is the case of *Lerner v. First Wisconsin National Bank,* 294 U. S. 116, which upon a first reading might cause one to believe it supported Appellants' theory. However, the court says at page 119:

> "Thus while an objecting creditor must file specifications showing grounds of his objection on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation."

In a subsequent case, *Northeastern Real Estate Securities Corporation v. Goldstein,* 91 F. 2d 943, the court explains exactly what the Supreme Court meant in the case of *Lerner v. First Wisconsin National Bank, supra,* and shows the reason why the Supreme Court required objections to be filed on the day set, the reason being that many creditors would file objections merely for the purpose of intimidating the bankrupt to the point of making him pay the objecting creditor off, at which point the objecting creditor would withdraw his objections. Such reasoning would not apply to the objections of a Trustee. In the *Lerner* case the court calls attention to Order No. 37 which states in part:

> "But the court may . . . otherwise modify the rules for the preparation or hearing of any particular proceeding."

It thus shows that the question of filing petitions on the day fixed is not jurisdictional, and as shown in the case

of *Northeastern Real Estate Securities Corporation,* there is a distinction drawn between the filing date and the return date.

II.

Was It Proper for the Referee to Make Findings of Fact and Conclusions of Law and Order Denying Discharges in the Individual Proceedings Based Upon Section 14-c(2) of the Act When No Specifications of Objections Based Thereon Were Filed Against Them?

Appellees are in this brief limiting their argument to the Objections based on Section 14-c(7).

III.

Was There Insufficient Evidence to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof, and Did Such Findings Support the Conclusions and Orders, and Were Such Findings Based on Material Evidence?

Appellants make much of the point that the 21-A examination of Frederick M. Rameson and William W. Rameson was not formally introduced at the hearing. No objection was made by Appellants either at the time of said hearing when reference was made to the transcript of the evidence taken in the 21-A examination [Tr. p. 164 *et seq.*], even though the statement was made that such transcript was part of the record [Tr. p. 164], and Appellants themselves accepted the fact that the 21-A examination was in evidence, as they quote therefrom extensively [Tr. pp. 209-210]. No objection was made by Appellants to the use of the transcript of such examination in Appellants' petition for review of the Referee's Order [Tr. p. 26 *et seq.;* p. 74 *et seq.*] even though the transcript of

the 21-A examination was included as part of the record in the Certificate of Review [Tr. pp. 31, 80].

The objection not having been made in the Court below, it will, of course, not be considered by this Court.

In re McCann Brothers Ice Co. (D. C. Pa.), 171 Fed. 265;

In re Massa, 133 F. 2d 191, 192.

Regardless, any testimony taken as authorized by a Referee is part of the record in the proceedings.

In re Samuelson (D. C. N. Y.), 174 Fed. 911, 912.

The Court will take judicial knowledge of its own records.

In re Osborne (C. C. A. Mass.), 115 Fed. 1, 2.

When an objector has shown to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities, then the burden of proof falls on the bankrupt to explain satisfactorily such losses.

Bankruptcy Act, Sec. 14-c(7);

In re Smatlak (C. C. A. Ill.), 99 F. 2d 687, 689.

Were there losses of assets?

The deficiency was, in the words of Frederick M. Rameson "somewhere around $200,000" [Tr. pp. 111-112].

Does the bankrupt satisfactorily account for such losses?

Again, in the words of Frederick M. Rameson: "Frankly, sir, I cannot account for it" [Tr. pp. 111-112].

Frederick M. Rameson stated that he was making a profit of from $2,000 to $3,000 per house, and when he was asked how he accounted for the tremendous losses, he stated that he could not account for it [Tr. p. 115]. Frederick M. Rameson showed a complete disinterest in the uses of the money obtained and a complete shielding of the actual operations of the business [Tr. pp. 116-117, 202].

William W. Rameson testified that his testimony would be approximately the same to each one of the questions asked of Frederick M. Rameson [Tr. pp. 146-147]. Throughout the testimony of both the Ramesons we find that there was a general unconcern and a complete disregard of the internal operations of the partnership.

In their testimony, the bankrupts failed to account at all for the losses sustained. Such failure to account at all is certainly a failure to explain satisfactorily; the greater includes the lesser. Nowhere in the 21-A examination or on the hearing on objections to discharge has any of the bankrupts in this case given any evidence whatsoever to explain the losses which resulted in the adjudication. We challenge Appellants to produce any case in which a Court has failed to sustain a ruling denying a discharge in bankruptcy where a bankrupt has *admitted* that he cannot explain the reason for loss of assets. It has been held that even where the bankrupt states that he lost certain sums, estimated on a basis of about 20% to 25% of the value of goods turned over during the year, by sales below cost to meet competition, this was not a satisfactory explanation of losses in answer to creditors' objections to discharge.

In re Beckman (D. C., N. Y.), 6 Fed. Supp. 957, 958.

IV.

Did the Specifications of Objections State Facts Sufficient to Constitute a Ground of Objection to Discharge?

Appellants having failed to make this objection before the Referee, may not raise it for the first time on appeal.

In re Osborne (C. C. A. Mass.), 115 Fed. 1, 3;

Nix v. Steinberg (C. C. A. Ark.), 38 F. 2d 611, 612 (cert. den. 282 U. S. 838);

In re Peters (D. C. N. Y.), 39 Fed. Supp. 38, 39.

Even had Appellants not waived this objection, the allegations were sufficient. Specifications of Objections are sufficient if they fairly apprise the bankrupt of the nature and grounds of the objection which is being made to his discharge.

In re Simon, 268 Fed. 1006, 1009; affirmed 276 Fed. 391.

A persual of the Trustee's Specifications shows the Trustee was relying on Section 14-c(7) of the Bankruptcy Act and that the transcript of the bankrupts' 21-A examination would be used as proof thereof.

The Trustee was not objecting to the loss of any specific assets, but to the bankrupt's failure to explain the deficiency of assets to meet his liabilities. *Collier on Bankruptcy* in Volume I at page 1401 states:

> "A bankrupt may be denied a discharge if he '(7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities.'
>
> "This ground for denial of discharge was added to the Bankruptcy Act of 1898, in 1926, and was retained unchanged in the Act of 1938.

"Section 14-c(7) is broad enough to include any unexplained disappearance or shortage of assets, *as well as a mere insolvency itself, i. e.* an insufficiency of assets to meet liabilities."

Again in Volume I on page 1403 *Collier* states:

"Whether or not a mere showing of insolvency is sufficient to constitute a *prima facie* case has not been determined. The clause of the Act is broad enough to justify such an interpretation."

In *Federal Provision v. Ershowsky,* 94 F. 2d 574, 575, the Court stated:

". . .; and it would not be unduly severe to make the grant of all discharges conditional upon such an explanation. After all, nobody is in a better position to explain his losses than the bankrupt, and a discharge is a favor which ought to depend upon his utmost candor and cooperation."

In re Libowitz, 53 F. 2d 132, at p. 132, states:

"It is not enough for the bankrupt to leave it entirely to conjecture what became of his assets. He must not only explain, but explain satisfactorily any losses of assets or deficiency of assets."

Additionally, *In re Sperling,* 72 F. 2d 259, 261, states:

"When Section 14 of the Bankruptcy Act was amended in 1926 so as to preclude a discharge if a bankrupt 'has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities,' we think Congress meant to require much more in the way of explanation than vague generalities."

All members of a bankrupt partnership actively connected therewith have the duty of explaining the deficiency

of assets to meet liabilities. Failure to do same is grounds for denying discharge to both the partnership and to the individual partners.

In re Miller, 52 Fed. Supp. 526, 527.

V.

Should the Judge Have Made Findings of Fact and Conclusions of Law?

Title 11, Section 11(10) of U. S. C. A., provides that the Courts shall "consider records, findings and orders certified to the judges by referees, and confirm, modify or reverse such findings and orders, or return such records with instructions for further proceedings; . . ." It would appear, therefore, that the Court, upon a review of the Referee's order and records did confirm "such findings and orders." Are not Appellants requesting a useless act of the Court in asking that it copy the findings and conclusions of the Referee to be added to the record as the Court's separate findings, after having already confirmed them? Certainly it does not require any stretch of the imagination to assert that a judge in confirming findings and orders of a referee is adopting such findings and orders as his own.

The Appellants, under this heading, state:

> ". . . the findings of the Referee did not fully consider the allegations made in the Specifications of Objection to Discharge, and therefore there is a lack of finding on material issues."

Is it not the duty of Appellants to specify to the Court how and in what manner the Referee failed to consider the allegations and also to point out wherein there is a lack of findings on material issues so that the Court will not be burdened with the work of searching the record

for itself to determine such point? Appellees have searched the record and find no basis for such objection.

General Order No. 47 requires that the judge on review shall accept the Referee's findings of fact unless found to be clearly erroneous, and in the cases of *International Harvester v. Carlson,* 217 Fed. 736 and *In re Covington,* 110 Fed. 143, the Courts confirm that the Referee's findings of fact are entitled to the very highest consideration and should be accepted upon review, unless very plainly shown to be wrong.

Respectfully submitted,

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